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FREE PRESS-FAIR TRIAL

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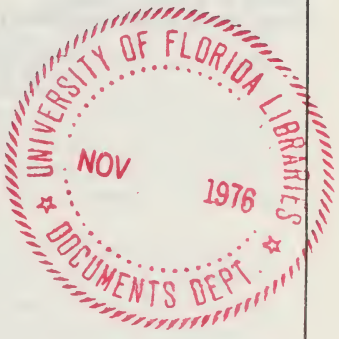

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PREFACE

"[F]ree speech and fair trials are two of the most cherished policies of our civilization," Justice Black once observed, "and it would be a trying task to choose between them." While a democratic society must continually weigh the right of the individual against the societal interest, it is the Subcommittee's view that in the occasional collisions between free press and fair trial, neither of these "cherished policies" need yield to the other. It is our further belief that the value of these two great freedoms is derived in part from the fusion of the individual with the social interest. The First Amendment provides that an informed populace be politically, intellectually, and spiritually free; the Sixth confers upon the lonely accused standing before the awesome tribunal of the state the right to an open and impartial trial of his peers which, in turn, insures the public's faith in the integrity of the judicial system.

In recent years with the rise of modern communications and news-gathering techniques, information concerning a trial is much more readily and broadly disseminated, often on a national scale. While this broad dissemination can serve to preserve the integrity of the judicial proceeding, it may, on occasion, work against the defendant. The right to an impartial jury, for example, may not be served by extensive pretrial publicity.

The recent *Nebraska Press Association et al.* v. *Stuart* decision only increases the necessity of resolving the dilemma posed by the free press-fair trial controversy. In *Nebraska* v. *Stuart,* the Court dealt only with direct prior restraints upon the press. It did not confront the issue of closed proceedings. Neither did it address itself to the problems raised by the issuance of restrictive orders upon trial participants. Both these procedures constitute a serious backdoor threat to First Amendment interests. In all probability, they also presage the next wave of free press-fair trial litigation.

For these reasons, I requested the staff of the Constitutional Rights Subcommittee to investigate the free press-fair trial controversy. Drawing upon research by Prof. A. E. Dick Howard of the University of Virginia Law School and its own study in this report, the Subcommittee recommends appropriate legislative guidelines to safeguard the First Amendment rights of trial participants while also preserving the fair trial rights of defendants. The Subcommittee hopes that enactment of these legislative standards will help to avert future collisions between First and Sixth Amendment freedoms.

JOHN V. TUNNEY,
Chairman, Constitutional Rights Subcommittee.

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INTRODUCTION

On June 29, 1976, the U.S. Supreme Court reaffirmed its traditional hostility to prior restraints upon the press. In *Nebraska Press Association* v. *Stuart*, it unanimously ruled that a Nebraska judge's restrictive order curbing news stories on a pending criminal trial was unconstitutional. In announcing this decision, the Court declared that "prior restraints on speech and publication are the most serious and least tolerable infringement on first amendment rights." [1] For while the threat of subsequent punishment "chills" speech, the Court contended, prior restraint "freezes" it.

Yet the Court stopped short of adopting a general rule banning all prior restraints on the press in the fair trial context. A majority hinted that given the proper circumstances they would endorse such a policy, but in this case the Court refused to foreclose the "possibility of showing the kind of threat to fair trial rights that would possess the requisite degree of certainty to justify restraints." [2]

In this report, the subcommittee assesses the issues not conclusively resolved or, in some cases, not even addressed in *Nebraska* v. *Stuart*. It is our view that prior restraints on the press are never justified in the fair trial context. Nor is subsequent punishment of the press for publication where no restrictive orders have been issued. In some circumstances restrictive orders on trial participants may be justified, but only if they conform to rigorous legislatively enacted guidelines. Our view is similar for the closing of trial proceedings and the sealing of court records.

The major portion of this report presents the case for, and substance of, legislative guidelines. No doubt, the appropriateness of the guidelines will be the subject of considerable debate within the press and legal communities. And so it should be. The subcommittee hopes that the specific legislative proposals recommended in the report will assist in advancing this debate and in assuring that a just course is charted.

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[1] *Nebraska Press Association* v. *Stuart*, 424 U.S. ——, —— 96 S. Ct. 2791, 2802 (1976).
[2] Ibid., 2808.

I. PRIOR RESTRAINTS: THE CONSTITUTIONAL RIGHTS SUBCOMMITTEE OPPOSES ANY PRIOR RESTRAINTS UPON THE PRESS IN THE FREE PRESS-FAIR TRIAL CONTEXT

In *Near* v. *Minnesota*, the first case involving press censorship to come before the Supreme Court, Chief Justice Hughes writing for the majority observed that "the chief purpose of the first amendment's guaranty is to prevent previous restraints upon publication." [3] Hughes was enunciating the uniquely American conviction, a conviction deeply rooted in the national ethic, that an unfettered and independent press is essential to the maintenance of a free society. Accordingly, the press has always occupied a special place in the American system. In the exercise of its power to investigate and criticize the Government's legislative, executive, and judicial functions, it has served as the guardian of our democratic principles. Not only has it sought out and revealed governmental corruption: it has also been a primary vehicle for social change. "Those who won our independence believed * * * that public discussion is a political duty," Justice Brandeis wrote in a recent decision, "and that this should be a fundamental principle of the American Government." [4]

The advantages of free press coverage of criminal trials are many. The defendant is protected from intimidation by the prosecution. Society is exposed to the workings of the criminal justice system. Those who would commit similar crimes may be deterred by observing that some get caught. And, those who would change the system can collect examples of specific instances where the laws or the courts or the legal profession have failed.

There are also some disadvantages of unfettered press coverage of criminal trials—primarily the prejudicial effect such publicity may have on a defendant's right to a fair trial. For, like other institutions, the press is capable of error. There are occasions where the reporting of a criminal trial is excessive, inaccurate, unfair, or indiscreet. But these problems should be dealt with by setting rigorous professional standards and disciplining those who fail to live up to them. Prior restraints are too harsh a remedy, their mark too indelible for them to be appropriate here. In this regard, the subcommittee supports self-policing by the press itself rather than intervention by a trial judge.

Self-policing is an especially judicious course when we consider that the Supreme Court itself tolerates a certain level of jury prejudice. This is consistent with the general supposition that the more intelligent a prospective juror is, the more likely it is that he will have read about a pending criminal case and formed some opinion on it. It should also be noted that even the most intense press coverage usually reflects diverse viewpoints and can lead to prejudgment on both sides of a

[3] *Near* v. *Minnesota*, 283 U.S. 697, 713 (1931).
[4] Mr. Justice Brandeis, concurring, *Whitney* v. *California* 274 U.S. 357, 375 (1927).

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case. Moreover, even where sensational press coverage has led jurors to form preconceived notions as to a defendant's guilt, research has indicated that the experience of the trial itself can reduce prejudice to the vanishing point.[5] It is also possible that the unconscious prejudices to which all of us are to some extent subject may ultimately have more effect upon a juror's decision than anything he reads in the newspaper during the course of a trial.

But even in those instances in which the Court has determined that jury prejudice reached the impermissible level, remedies other than prior restraints have generally been recommended.

In the celebrated Sheppard murder trial, the following conditions prevailed. Throughout the entire pretrial period virulent and incriminating publicity about the defendant and the murder of his wife made the case notorious. The news media frequently aired charges and countercharges in addition to those for which the defendant was tried. Three months before trial, the defendant was examined for more than 5 hours without counsel in a televised 3-day inquest conducted before an audience of several hundred spectators in a gymnasium. Over 3 weeks before the trial the newspapers published the names and addresses of prospective jurors causing them to receive letters and telephone calls about the case. Newsmen were allowed to take over almost the entire small courtroom, harrassing the defendant, and most of the trial participants. Twenty reporters were assigned seats by the court within the bar and in close proximity to the jury and counsel, precluding privacy between the defendant and his counsel. A broadcasting station was assigned space next to the jury room. Pervasive publicity was given to the case throughout the trial, most of it involving incriminating evidence not introduced at the trial. At least some of this highly prejudicial publicity reached the jurors.

From the day of Mrs. Sheppard's murder, some of the more striking newspaper headlines dealt with: (1) Sheppard's refusal to take a lie detector test; (2) scientific blood tests (never presented as evidence at trial) refuting Sheppard's version of events; (3) Sheppard's general uncooperativeness with police authorities; (4) Sheppard's extramarital love affairs as a motive for the crime.

Notwithstanding, the Supreme Court recommended only the use of traditional protection measures. It ruled that the trial court should have: (1) adopted stricter rules governing the use of the courtroom by newsmen; (2) insulated the witnesses; (3) made some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and counsel; (4) raised with counsel the possibility of jury sequestration; (5) considered a continuance or a new trial. "We conclude that these procedures would have been sufficient to guarantee Sheppard a fair trial," Justice Clark wrote for the majority, "and so do not consider what sanctions might be available against a recalcitrant press * * *" [6]

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[5] Dziamba, "The Free Press-Fair Trial Controversy—An Empirical Approach," 2 *Conn. L. Rev.* 351, pp. 366–7.

[6] *Sheppard* v. *Maxwell*, 384 U.S. 358 (1966).

The subcommittee fully agrees with the court that alternatives less restrictive upon press freedoms should be invoked in the fair trial context. It is the purpose of this report, moreover, to encourage the broader use of these alternatives. While we do not claim that these measures will in every case prevent jury prejudice, we believe that those cases in which the defendant's rights cannot be adequately protected by less restrictive means will be few. We also believe that the cost of mistrials in isolated instances is far less than the cost of opening the door to judicial discretion in the imposition of prior restraints upon the press.

II. SUBSEQUENT PUNISHMENT FOR CONTEMPT: THE CONSTITUTIONAL RIGHTS SUBCOMMITTEE OPPOSES THE USE OF SUBSEQUENT PUNISHMENT OF THE PRESS FOR PUBLICATION WHEN NO RESTRICTIVE ORDERS HAVE BEEN ISSUED

Generally, in constitutional adjudication, prior restraints against publication have been considered more damaging to first amendment liberties than subsequent punishment. As the Supreme Court recently noted:

> The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand . . .[7]

The concept behind this distinction is that in subsequent punishment cases, at least the information in question is released and disseminated: it is allowed to enter the marketplace of ideas.

And yet, while this punishment is less damaging to first amendment freedoms than the imposition of prior restraints, it is still an unacceptable means of restraining publication. Since the subsequent contempt procedure provides the press with no guidelines whatsoever as to which publications are permissible and which are not, it encourages self-censorship. The chilling effect resulting from subsequent punishment, therefore, may be tantamount to an actual prior restraint. For this reason, the subcommittee opposes the use of subsequent punishment of the press for publication when no restrictive orders have been issued.

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[7] *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 558-559 (1975).

III. RESTRICTIVE ORDERS: THE CONSTITUTIONAL RIGHTS SUBCOMMITTEE RECOMMENDS THE ENACTMENT OF LEGISLATION FOR THE ISSUANCE OF RESTRICTIVE ORDERS UPON TRIAL PARTICIPANTS

As with prior restraints upon the press, restrictive orders upon trial participants also pose problems to first amendment liberties. In addition to trial participants' personal freedom of speech, freedom of the press, and the public's right to know are affected by restrictive orders. Indeed, the imposition of restraints upon the speech of individuals connected with a trial can inhibit press coverage almost to the same extent as restraint placed directly upon the publishers of news. While the restriction upon the press is an indirect one, its tendency to cut off news at the source may have the same practical effect as the imposition of a prior restraint.

In recent years, there has been a marked increase in the number of restrictive orders on trial participants.[8] When these orders have been issued, the courts have usually cited the *Sheppard* case as justification. There, Justice Clark noted that—

> The trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters.[9]

In the past, there has been no uniform standard used by the courts in the issuance of restrictive orders. Some courts have required that there be only a "reasonable likelihood" that prejudicial news affect the impaneling of a jury.[10] Others have tried to adapt the "clear and present danger" standard or a hybrid thereof. It is the subcommittee's view that both these modes of review are seriously deficient as currently applied. The reasonable likelihood criterion is far too lenient as a justification for infringement upon first amendment freedoms. The clear and present danger formula in the absence of further definition is too vague and affords inadequate guidance to judges issuing restrictive orders.

The subcommittee therefore proposes a standard which derives from the clear and present danger test but which gives the test specificity. The standard incorporates the recent criterion used by the U.S. Seventh Circuit Court of Appeals in *Chicago Council of Lawyers* v. *Bauer* for the issuance of restrictive orders on trial participants. In that case, the court held that restrictive orders should be issued only where the statements to be restrained constituted a serious and imminent threat of interference with the fair administration of justice.[11] The subcommittee uses the general rule cited in *Bauer* but specifies what is meant by "serious" and "imminent," thereby

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[8] One such order was issued in 1972; 7 were issued in 1973; 11 in 1974; and 18 in 1975.
[9] *Sheppard* v. *Maxwell*, op. cit., p. 361.
[10] *U.S.* v. *Tijerina*, 412 F. 2d 661, 666 (10th Cir.), cert. denied, 396 U.S. 990 (1969).
[11] *Chicago Council of Lawyers* v. *Bauer*, 522 F.2d 242 (7th Cir. 1975), cert. denied sub nom. *Cunningham* v. *Chicago Council of Lawyers*, 44 U.S.L.W. 3756 (June 30, 1976) (No. 75-1296).

eliminating the vagueness and ambiguity which can adhere to these terms.

This standard would apply to all Federal courts. In addition, Congress has several options with regard to the use of the standard in State courts. It could recommend the standard as a model for companion legislation in the States, recognizing that the Supreme Court is likely to define the State court requirements for protection of first amendment freedoms when they clash with sixth amendment rights. On the other hand, Congress might wish to invoke its enforcement power under the 14th amendment to assist the Court in defining the procedures necessary to protect 1st amendment rights as they are applied to the States under the 14th amendment. Since the Supreme Court has not resolved the precise constitutional claims addressed in this standard, it is possible that it would defer to Congress' determination in this regard.

STANDARD I

I. A Restrictive Order Upon Trial Participants may not Issue Unless:

A. (Substantive provisions)

1. The prejudicial impact of the extrajudicial statement constitutes a serious and imminent threat to the fair administration of justice in that—

(a) there is probable cause to believe that the extrajudicial statement will reach the jurors or potential jurors;

(b) there is probable cause to believe that such statement upon reaching the jurors or potential jurors will create an impermissible level of prejudice; and,

(c) the prejudicial impact of the extrajudicial statement cannot be avoided or counteracted by alternative means less restrictive upon first amendment rights.

(1) In assessing whether other means less restrictive upon first amendment rights are available, the court must consider whether the rights guaranteed by the fifth and sixth amendments can be adequately preserved through—

(a) continuance; (b) waiver of jury trial by the defendant; (c) severance; (d) change of venue; (e) change of venire; (f) an expanded *voir dire*; (g) additional peremptory challenges; (h) sequestration of the jury; (i) admonition to the jurors; and (j) other procedures less restrictive upon first amendment freedoms.

B. (Procedural provisions)

1. The court gives notice to interested parties of a hearing on any motion to issue the order;

2. The judge states for the record his findings of fact justifying such order; and

3. There is available a procedure for an expedited, interlocutory appeal concerning the merits of such order; and, the appeal process is designed to produce a prompt judicial decision.

C. (Standing provision).

1. Members of the press are accorded standing to litigate the propriety of such order.

II. If Any Order Issued as Provided in Section I is Subsequently Judged Invalid by an Appellate Court, No Person Shall be Punished for any Violation of Such Order.

Explanation of Standard I

probable cause—section 1 a(1) (a) and (b)

These sections are designed to guide a judge through a preliminary determination concerning whether a restrictive order may ultimately be necessary. Before considering the availability of alternative protective measures, the judge must first ask: (1) is there *probable cause* to believe that the envisioned extrajudicial statement will reach the jurors or potential jurors? and, if so, (2) is there *probable cause* to believe that this statement will create an impermissible level of prejudice? If probable cause cannot be established in both instances, the judicial inquiry regarding the feasibility of a restrictive order must fail at this point. Even if probable cause is established concerning both sections, the mandatory requirement of section A(1)(c) must also be met.

The Supreme Court has already considered the concept of probability as it relates to a fair trial. In *Estes* v. *Texas*, a case dealing with the effect of prejudicial publicity upon a jury, the Court declared that even the "probability of unfairness" was sufficient to constitute a breach of the fair trial guarantee.[12] In the recent *Nebraska* v. *Stuart* decision, it was the lower court's failure to show the "probability" of harmful effects of pretrial publicity that defeated a restrictive order upon the press. "Reasonable minds can have few doubts about the gravity of the evil pretrial publicity can work," the Court stated, "but the probability that it would do so here was not demonstrated with the degree of certainty our cases on prior restraint require." [13] The trial judge failed to establish or to examine the "probable extent of publicity," "the probable nature of the publicity," "the probable efficacy of the measures short of prior restraint," and the "probable efficacy of prior restraint." [14] This notion of probability was also recently extended to the first amendment context and refined into a precise standard of review: dissenting in a case involving reporters' privilege Justice Stewart proposed that, in addition to other showings, the Government be required to demonstrate *probable cause* to believe that a reporter has information clearly relevant to a specific *probable* violation of the law.[15] Utilizing this test, in the subcommittee's standard, before a judge may proceed to examine the other elements of the standard, he must preliminarily determine that probable cause has been fulfilled as to sections A(1)(a)(b).

impermissible prejudice—section 1 a(1)(b)

In *Murphy* v. *Florida*, the Court clarified the burden which must be met before a conviction would be set aside because of prejudicial publicity. In that case, the defendant, who had been convicted in a State court of robbery, contended that he had been denied a fair trial because the jurors had learned from news accounts of prior felony convictions and certain facts about the robbery charge. The Court held

[12] *Estes* v. *Texas*, 381 U.S. 532, 542-543 (1965).
[13] *Nebraska Press Association* v. *Stuart*, op. cit., p. 2807.
[14] Ibid., pp. 2804-2806.
[15] *Branzburg* v. *Hayes*, 408 U.S. 665, 743 (1972). The Court has recognized that the issues in this case were similar to those in the restrictive order context. (See *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U.S. 1301, 1307 (1974).)

that juror exposure to information about a State defendant's prior convictions or to news accounts of the crime with which he was charged did not alone presumptively deprive the defendant of due process:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.[16]

In the Court's view, which the subcommittee shares, impermissible prejudice would seem to be that degree of prejudice which prevents a juror or potential juror from "laying aside" past impressions or opinions and rendering a verdict based on the evidence present in court. While the judge's determination of such prejudice is inevitably a subjective one, it is the subcommittee's view that the impermissible prejudice requirement as defined in the *Murphy* case is a difficult one to meet. This is especially true because measures designed to prevent or ameliorate prejudice must be utilized wherever available.

ALTERNATIVE MEASURES—SECTION I A(1)(C)

It is the subcommittee's view that the use of the measures listed in section I A(1)(c) of the standard will obviate the necessity for restrictive orders. In most instances, the existence of the threat of prejudice can be handled by one or more of these alternative means:

- A continuance (temporary postponement) of the trial can result in the dissipation of prejudicial publicity.
- A waiver of jury trial by the defendant, in preference for a bench trial by an "unemotional trier," can also protect the defendant against damaging publicity.
- Severance of the trial into separate trials can protect a defendant(s) from the taint of prejudicial publicity concerning another defendant(s).
- A change of venue to another county can often cure the harmful effect of pretrial publicity.
- A change of venire (panel of potential jurors) can eliminate the unwieldy procedure of transferring the entire trial while still reducing the effects of prejudicial publicity by obtaining jurors from another area.
- An expanded *voir dire* procedure can provide counsel with a better opportunity to probe prejudice among prospective jurors.
- The granting of additional peremptory challenges can also assist counsel in selecting an impartial jury.
- Sequestration of the jury can insulate jurors from a prejudicial atmosphere potentially damaging to the defendant's interest.
- Admonition to the jurors, as a last reminder that the case should be decided solely upon the evidence presented in court, can help to quell the effects of prejudicial publicity.

In addition to these measures, the standard requires that any other procedures available which are less suppressive of first amendment liberties be used in lieu of restrictive orders.

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[16] *Murphy* v. *Florida*, 421 U.S. 794, 800 (1975). Quoting *Irvin* v. *Doud*, 366 U.S. 717, 723 (1961).

Each of these alternative methods must be considered by the court and the judge must record specific findings of fact concerning their substantive inadequacy before a restrictive order can issue. Such a procedure is compatible with the Supreme Court's requirement that the least restrictive measures available be employed in the first amendment context.[17]

NOTICE OF A HEARING ON A MOTION TO ISSUE A RESTRICTIVE ORDER—I B(1)

Before issuing a restrictive order, the judge must give notice of a hearing on the motion to issue it to all the trial participants. Written views concerning the motion could also be filed by members of the press at this hearing. It is the subcommittee's view that such a procedure would dramatically reduce ill-advised restrictive orders as well as serve to eliminate the need for an interlocutory appeal since, in many instances, those opposing the orders would be afforded an opportunity to hear the reasons why those requesting the orders consider them necessary. The same would apply for closed proceedings.

FINDINGS OF FACT—I B(2)

The requirement that a judge report his findings of fact reduces for the record the specific arguments for a secret proceeding. This can be an invaluable tool for the individual seeking to appeal a decision imposing a restrictive order. Indeed, in the absence of such a provision, an interlocutory appeal would be a hollow guarantee.

INTERLOCUTORY APPEAL—SECTION I B(3)

It is the subcommittee's view that an interlocutory appeal is necessary to protect first amendment interests. An expeditious ruling on the validity of a restrictive order reduces the problem of timeliness of publication, while obviating the need for a stay of the trial.

I B (3) prescribes that the appeal process be designed to produce a prompt judicial decision. Just as a restrictive order should last no longer than is absolutely necessary, the period of judicial review of such order should also be as brief as possible.

STANDING FOR THE PRESS—I C

Not only do restrictive orders suppress the speech of trial participants, they also infringe upon the freedom of the press by cutting off news at the source. Perceiving this threat to the press, some courts have accorded the press standing to contest the issuance of restrictive orders upon trial participants. Most courts, however, have failed to do this. Judges argue that since the press is not a party to the trial, since it is not *directly* restrained by restrictive orders, and since injury to it is not "concrete," standing is not justified. The subcommittee disagrees. We propose that where restrictive orders are issued upon trial participants, the press, along with those upon whom the orders fall, should be accorded standing to litigate the validity of the restriction. To deny

[17] See *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

standing to the press is, in our view, to sanction restraint upon a vital first amendment interest without the appropriate procedural safeguard.

The subcommittee considered extending standing to the public as well as to the press. While such standing could entail problems, it is a matter which probably should be investigated further when the legislation is introduced.

SUBSEQUENT PUNISHMENT—II

This section is designed to correct current practice and to provide greater protection of first amendment liberties. In the past, a person violating court directives later adjudged invalid has still been held in contempt.[18] While this practice may be valid in other situations, its effect in the free press-fair trial context would be to chill the exercise of first amendment rights. Because the subcommittee standard provides for an expedited appeal, it would in practice stay any punishment for contempt until the appeal process has been exhausted.

CITING REPORTERS FOR CONTEMPT AS AN ENFORCEMENT PROCEDURE

While most courts have been reluctant to accord press standing to protest restrictive orders upon trial participants, they have not been reluctant to hold the press responsible when such orders are violated. Reporters have recently been cited for contempt when refusing to disclose which of the trial participants divulged restricted information to the press. The subcommittee believes that punishing a reporter in this way is ill-advised and inappropriate. If a restrictive order on a trial participant has not been complied with, it is the trial participant and not the reporter who is at fault. The appearance of restricted information in a publication is merely the consequence of the violation. In the subcommittee's view, only the trial participant should be subject to punishment. No member of the press should be held in contempt for refusing to disclose the identity of persons who have transmitted information prohibited under a restrictive order or for refusing to disclose the content of such information. To hold reporters responsible in such matters would be to undermine severely their right to gather and report the news.

RESTRICTIVE ORDERS ON THE DEFENDANT

The subcommittee considered exempting the defendant altogether from the provisions of this bill. It was decided, however, that an absolute ban on the issuance of restrictive orders upon the defense would be unwise. Even so, the judge should exercise extreme caution in issuing restrictive orders upon those associated with the defense. It is, after all, primarily the defendant's right to a fair trial which the sixth amendment guarantees. Moreover, in criminal trials, the defendant is opposed by the full power of the State and it is only fair that he be given maximum latitude in addressing himself to his

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[18] *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967). See also *United States* v. *Dickinson*, 465 F. 2d 496 (5th Cir. 1972), cert. denied, 414 U.S. 979 (1973).

defense. On the other hand, the public has a right to a judicial process untainted by prejudice against the prosecution, especially since the Constitution secures so many rights for the protection of the defendant.

When issuing orders upon the defense, the judge should distinguish between the defendant and his counsel and the defense witnesses. We must presume that the defendant will not knowingly make extra-judicial statements harmful to his own best interest. In some instances, however, the defense witness may not hold the defendant's interest paramount. Indeed, in the recent Patty Hearst trial, one of the psychiatrists testifying for the prosecution had indicated an initial willingness to testify for either side. The less harmonious the interests of the defendant and the witness, the less hesitant the judge should be in issuing restrictive orders upon the witness. In all cases, however, extreme caution should be employed in restricting statements of the defendant.

IV. ALTERNATIVE METHODS OF PROTECTING FREE PRESS-FAIR TRIAL INTERESTS

A panoply of remedies has traditionally been employed by the judiciary to avert all forms of potential prejudice to a fair trial. Only recently have the courts relied upon the more repressive procedure of issuing restrictive orders to prevent that form of prejudice which results from a highly publicized trial. In a recent NBC documentary on fair trial-free press, one of the judges interviewed admitted that restrictive orders had become so commonplace that many attorneys felt they were shirking their professional responsibility to their client if they neglected to request the issuance of such orders.

An interview of trial judges concerning their assessment of the effectiveness of traditional measures as means of guarding the defendant against prejudicial publicity revealed the following results:[19]

	Number of judges	Strongly/ moderately effective (percent)
1. Continuance	251	82.1
2. Severance	306	77.8
3. Change of venue	184	77.2
4. Venire from another county	58	74.1
5. Voir dire	408	47.6
6. Sequestration	259	86.9
7. Admonition	419	62.1

By the judiciary's own account, conventional remedies are for the most part effectual in preventing prejudicial publicity. While some measures are considered more effective than others, this rating is based on the sole use of the method in question. If each of these procedures were used in conjunction with other methods, the overall effectiveness should increase considerably. Moreover, it is the subcommittee's view that the traditional devices for warding off prejudice can be improved to the extent that a careful administering of them will reduce the necessity for restrictive orders almost to the vanishing point. In suggesting improvements in these procedures, the subcommittee has adopted the court's dicta set forth in *Sheppard* v. *Maxwell* that the traditional methods be utilized whenever there is a reasonable likelihood of prejudice.[20]

[19] F. Siebert, W. Wilcox, G. Hough III, "Free Press Fair Trial" 14 (C. Bush ed. 1970).
[20] *Sheppard* v. *Maxwell*, op. cit., p. 363.

CONTINUANCE

Where prejudicial publicity is so prevalent that it is impossible to conduct a fair trial anywhere in the State, a continuance or temporary postponement of the trial may be in order. The effectiveness of this device is directly proportional to the endurance of the prejudicial publicity and the public's interest in the case.

Title 18 United States Code, section 3161 permits a continuance where—

> The ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial—

And where failure to grant a continuance would be "likely" to "result in a miscarriage of justice."

In the subcommittee's view, this standard is both vague and ambiguous. We therefore propose that a continuance be granted whenever there is a *reasonable likelihood* that, in the absence of such relief, prejudicial publicity will prevent a fair trial and when there is a *reasonable likelihood* that a fair trial will be possible after such continuance.

WAIVER OF JURY TRIAL

If none of the above procedures are effective and the prospects for a fair jury trial are doubtful, the defendant may waive his right to trial by jury. Rule 23(a) of the Federal Rules of Criminal Procedure allows waiver "with the approval of the court and the consent of the government."

Waiver of jury trial is not a happy solution to problems of prejudice since it forces the defendant to choose between two important constitutional rights—the right to a fair and impartial trial and the right to trial by jury. Nevertheless, since the sixth amendment guarantee is intended primarily to protect the right of the individual defendant, the subcommittee proposes that a defendant be allowed to waive jury trial if:

(1) There is a *reasonable likelihood* that prejudicial publicity will adversely affect the outcome of the trial, and

(2) the waiver is made in writing, knowingly and voluntarily.

SEVERANCE

When there are multiple defendants in a case, prejudicial publicity concerning one or more defendants may spill over and harm the others. Often a severance or separate trials for joint defendants is in order. Rule 14 of the Federal Rules of Criminal Procedure provides that the court may order separate trials when—

> It appears that a defendant or the Government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together.

In conformity with the reasonable likelihood standard espoused by the Court and suggested in the above procedures, the subcommittee proposes that a severance of a trial be permitted when there is a *reasonable likelihood* that one or more of the defendants will not receive a fair trial due to prejudicial publicity against another defendant(s).

CHANGE OF VENUE

A change of venue, or the transfer of the trial to another county or judicial division, is used primarily to eliminate the effects of local prejudicial publicity. While this procedure is often ineffective where there has been a statewide saturation of publicity, it can be very useful when the prejudicial news is localized.

Some State statutes restrict the availability of this device. Nebraska law, for example, permits a change of venue only to adjoining counties. Frequently adjacent counties are just as exposed to pretrial publicity as the original place of venue and moving the trial there would serve no useful purpose. In the *Nebraska* v. *Stuart* case, the Court attacked these restrictive statutes in declaring that "State laws restricting venue must on occasion yield to the constitutional requirement that the State afford a fair trial."[21] In stating this, the Court was reaffirming the principle that under the Constitution a defendant must be given an opportunity to show that a change of venue is warranted, and if that is shown, to obtain the change.

In addition to guaranteeing due process in this context, the Court has also established guidelines for what conditions justify a change of venue. The constitutional standard for change of venue provides that "* * * where there is a reasonable likelihood that the prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates or transfer it to another county not so permeated with publicity."[22] In contrast, Rule 21(a) of the Federal Rules of Criminal Procedure prescribes a change of venue to another judicial district only when the judge is "satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial * * *"

The subcommittee questions the wisdom of a Federal standard which permits a change of venue only when a judge is fully satisfied that a fair trial is an impossibility in the district in which the crime was committed. Such a standard fails to take into account that some judges may be reluctant to grant changes of venue because of an unwillingness to admit that they cannot guarantee a fair trial in their own courtrooms. By requiring such admission, the standard discourages the use of a procedure which can be less onerous than sequestration of the jury, continuance, or other expensive and inconvenient techniques.

The subcommittee sees no reason to inhibit the use of this effective method of coping with prejudicial publicity. We therefore propose that a motion for change of venue shall be granted whenever there is a *reasonable likelihood* that the dissemination of prejudicial publicity would damage the defendant's right to a fair trial in the absence of such relief.

CHANGE OF VENIRE

This device is similar to a change of venue in that the panel of potential jurors are selected from other judicial districts where it is presumed the prejudicial publicity has not permeated. The jurors are

[21] *Nebraska Press Assn.* v. *Stuart*, *op. cit.*, p. 2805, n. 7.
[22] *Sheppard* v. *Maxwell*, *op. cit.*, p. 363. See also *Rideau* v. *Louisiana*, 373 U.S. 723, 727 (1963), and *Irvin* v. *Dowd*, 366 U.S. 717, 728 (1961).

brought to the trial rather than the trial to the jurors. This method eliminates the cumbersome procedure of transferring the entire trial while still reducing the effects of local prejudice. It is a rarely used device but is still a good alternative means of combating prejudicial publicity.

VOIR DIRE

While a change of venue is used to avoid the effects of prejudicial publicity, *voir dire*—the questioning of prospective jurors by counsel—is used to eliminate in advance those jurors who are judged to be biased for whatever reason.

Rule 24(a) of the Federal Rules of Criminal Procedure provides that the court may permit *voir dire* by counsel or by the court itself. Further inquiry is allowed as the court "deems proper."

The ABA Reardon Report notes a serious deficiency in the *voir dire* procedure.[23] The report points out that research has shown *voir dire* to be relatively ineffective when the examination of each juror takes place in the presence of other jurors. In view of this, the subcommittee proposes that whenever there is a *reasonable likelihood* that some member of the pool of potential jurors will be ineligible because of exposure to prejudicial material, a *voir dire* shall be permitted where the examination of each juror shall take place outside the presence of the others. The subcommittee also recommends that in a sensational trial context, counsel be given more leeway by the court to probe prejudice on *voir dire* beyond the traditionally acceptable scope of examination.

PEREMPTORY CHALLENGES

Another method of eliminating biased jurors is through the issuance of peremptory challenges. This procedure allows counsel to dismiss prospective jurors for whatever reason he sees fit. Rule 24(b) of the Federal Rules of Criminal Procedure specifies that the number of peremptory challenges to be accorded each side in a criminal proceeding depends upon the gravity of the offense: for example, 20 challenges are permitted in a murder trial, 3 where the offense is punishable by not more than a year imprisonment. While these numbers are probably adequate for most trials, it should be noted that the challenges allowed have usually been exhausted in the fair trial-free press cases reaching the Supreme Court.

The subcommittee feels that this method of sifting out prejudice among jurors should be at the full disposal of counsels for both the defense and prosecution whenever necessary and, for this reason, we recommend that whenever there is a *reasonable likelihood* that, due to pervasive publicity, the alloted peremptory challenges will not be adequate, a judge shall permit a number of such challenges sufficient to counter jury bias.

SEQUESTRATION

Sequestration or insulation of the jury is usually employed as a last resort. It is an expensive procedure which can entail considerable hardship to the jurors. Nevertheless, it is a highly effective measure where prejudicial publicity during trial is so widespread that no other

[23] Advisory Committee on Fair Trial and Free Press, ABA Project on Minimum Standards for Criminal Justice, *Standards Relating to Fair Trial and Free Press* (1968) (Approved Draft) (The "Reardon Report").

device is satisfactory. While the subcommittee encourages the use of other procedures whenever possible, it proposes that when there is a reasonable likelihood that an impermissible level of prejudicial publicity cannot be avoided in the absence of such relief, a judge may sequester the jury.

ADMONITION TO THE JURORS

Another method used by the court to counter prejudice is the judge's admonition to the jurors. This entails such things as instructions to the jurors at the beginning of the trial and periodically during it not to read or listen to reports about the trial or the defendant, as well as instructing them to disregard impermissible evidence raised in court.

The potential benefit of such a procedure is enormous. For the judge's final instructions are the last words uttered in the courtroom before the jurors convene to determine the outcome of a case. It is the subcommittee's view that such counseling from an authority figure can exert a profound psychological influence upon the jurors and go a long way toward quelling the effects of prejudicial publicity.

Summary

As is evident, there are numerous procedures available to prevent or nullify the effects of prejudicial publicity. Many of these traditional methods can be used at any stage in the judicial proceeding and all of them are effective in certain specified circumstances. When used intelligently and with the suggested modifications, these procedures should dramatically reduce if not altogether eliminate the need for restrictive orders upon trial participants.

V. CLOSED PROCEEDINGS

Closing the judicial proceeding to both the press and the public is another method employed by the judiciary to avoid prejudicial publicity. In recent months, this procedure has been invoked with increasing frequency, giving rise to the speculation that the courts are attempting to avoid involvement in the restrictive order controversy. Yet closed proceedings can be just as injurious to first amendment interests as the promiscuous issuance of restrictive orders. In both cases, the public is deprived of the right to know certain specific information. And if the entire proceeding is conducted in secret, the public lacks even a general knowledge of how the trial is progressing. For these reasons, the subcommittee proposes the following standard for closed proceedings, using the same basic criteria as are suggested for the standard on restrictive orders.

STANDARD II

A Judge May Not Close Any Proceeding, Whether at the Pretrial Level or During the Trial Itself, Nor Seal Any Document Unless:

A. (Substantive provision)

1. The failure to close the proceeding or to seal the document constitutes a serious and imminent threat to the fair administration of justice in that—

(a) There is probable cause to believe that danger to the fair trial rights of the defendant, or other specified interests would result; and

(b) There is probable cause to believe that the danger specified in A(1)(a) cannot be avoided or counteracted by alternative means less restrictive upon first amendment rights.

(1) In assessing whether other means less restrictive upon first amendment rights are available, the court must consider whether the rights guaranteed by the fifth and sixth amendments can be adequately preserved through—

(a) Continuance; (b) waiver of jury trial by the defendant; (c) severance; (d) change of venue; (e) change of venire; (f) an expanded *voir dire;* (g) additional peremptory challenges; (h) sequestration of the jury; (i) admonition to the jury; and (j) other procedures less restrictive upon first amendment freedoms.

B. (Procedural provisions)

1. The court gives notice to interested parties of a hearing on any motion to close any proceeding or to seal any document.

2. The judge states for the record his findings of fact justifying the closing or the sealing.

3. There is available a procedure for an expedited, interlocutory appeal concerning the merits of the closing or the sealing; and, the appeal process is designed to produce a prompt judicial decision.

C. (Standing provision)

1. Members of the press are accorded standing to litigate the propriety of the closing or the sealing.

Explanation of Standard II

closed proceedings—a(1) (a) and (b)

A(1)(a) This provision provides that no proceeding or part thereof can be closed unless there is probable cause to believe that danger to the fair trial rights of the defendant or other specified interests will result. Other specified interests might include such things as the protection of juries from physical intimidation or harassment after conclusion of the trial, the protection of minors from exposure to testimony regarding sexual offenses, or the guarding of information concerning hijacking operations. Further consideration of this provision would in all probability result in additional specific criteria.

A(1)(b) This provision provides that a judge shall not close any proceeding or a part thereof unless there is probable cause to believe that the alternative measures listed in this section would be ineffective in avoiding the dangers specified in A(1)(a).

See standard I for discussions of sections B and C.

de minimis secrecy

While the standard proposed for closed proceedings applies to the closing of any part of a proceeding or the sealing of any part of a document, the subcommittee recognizes that de minimis secrecy may on occasion be warranted and that the burden upon the court posed by this standard to invoke such secrecy may be excessive. This secrecy might include such things as the excision of words from a document which are not relevant to the issues at trial. If the relevancy of the excised material is seriously contested, however, the secrecy should not then be considered de minimis. In any event, the subcommittee recommends that consideration be given to including additional provisions in the standard to deal with this problem.

conclusion

In the subcommittee's view, the sixth amendment right of an individual to a fair trial and the first amendment guarantee of a free press are not incompatible. As suggested above, a careful administering of the traditional methods of combating prejudicial publicity should allow both these freedoms to flourish. And in the end, these "cherished policies" complement each other. A fair trial and an efficient judicial process bolster society's faith in the kind of open society which the first amendment was designed to protect; similarly, the rights of a criminal defendant are protected by public scrutiny of judicial proceedings a free press brings to bear.

Finally, it is the subcommittee's belief that the intersecting of these two fundamental liberties reaffirms the genius of the Bill of Rights. For not only do the provisions of this document secure the individual against the potential tyranny of the State: they complement each other and, by doing so, help to preserve society's faith in our democratic form of government.

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